

ESTTA Tracking number: **ESTTA679930**

Filing date: **06/24/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	86151111
Applicant	Haht Sahs, LLC
Applied for Mark	HAHT SAHS
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Submission	Appeal Brief
Attachments	trce_4581_20150513_2015_appeal_brief.pdf(64965 bytes)
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Date	06/24/2015

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Appellant: Haht Sahs, LLC)	
)	
Mark: HAHT SAHS)	
)	Ex Parte Appeal No.: 86151111
Serial No.: 86/151,111)	
)	Examining Attorney: Aretha Somerville
Filing Date: December 23, 2013)	
)	

EX PARTE APPEAL

BRIEF IN SUPPORT OF APPEAL

This Appeal Brief is submitted in support of the Notice of Appeal filed electronically on May 13, 2015. A communication mailed on May 14, 2015, from the Trademark Trial and Appeal Board (TTAB) indicated the deadline for filing the present Appeal Brief is sixty days from the date of the appeal, or July 13, 2015.

Appellant and owner of the refused mark, Haht Sahs, LLC, submits the following in support of registration of the term HAHT SAHS.

I. ALPHABETICAL LISTING OF CITED CASES

H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc., 228 USPQ 528 (Fed. Cir. 1986)

In re Am. Fertility Soc'y, 51 USPQ2d 1832 (Fed. Cir. 1999)

In re Country Music Ass'n Inc., 100 USPQ2d 1824 (TTAB 2011)

In re Dial-A-Mattress Operating Corp., 57 USPQ2d 1807 (Fed. Cir. 2001)

In re DNI Holdings Ltd., 77 USPQ2d 1435 (TTAB 2005)

In re Merrill Lynch, Pierce, Fenner and Smith, Inc., 4 USPQ2d 1141 (Fed. Cir. 1987)

In re White Swan Ltd., 8 USPQ2d 1534 (TTAB 1988)

Magic Wand Inc. v. RDB Inc., 19 USPQ2d 1551 (Fed. Cir. 1991)

II. STATEMENT OF THE ISSUE ON APPEAL AND REQUESTED ACTION BY TTAB

Registration of the present mark, HAHT SAHS, for use in connection with sauces has been finally refused under the Trademark Act, section 2(e)(1). The refusal of registration is based on an assertion that the mark is generic.

Appellant respectfully requests reversal of the refusal and allowance of the present application, as the mark HAHT SAHS is a suggestive, unitary, and unique wording, and is not generic.

III. ARGUMENTS

a. Appellant's Mark is not Generic Under the Appropriate Standard

Generic terms are common names that the relevant purchasing public understands primarily as describing the genus of goods or services being sold. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807 (Fed. Cir. 2001), citing *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986). "The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question." *Marvin Ginn* 228 USPQ 528 (internal citations omitted); See also *In re Am. Fertility Soc'y*, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999); and *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991). Making this determination "involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered . . . understood by the relevant public primarily to refer to that genus of goods or services?" *Marvin Ginn*, 228 USPQ at 530.

The Examining Attorney has the burden of establishing by clear evidence that a mark is generic. *In re Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987); *In re Am. Fertility Soc'y*, supra; and *Magic Wand Inc.*, supra. "Doubt on the issue of genericness is resolved in favor of the applicant." *In re DNI Holdings Ltd.*, 77 USPQ2d 1435, 1437 (TTAB 2005).

i. HAHT SAHS is a Suggestive, Unitary, and Unique Wording, and is Not Generic

The Examining Attorney believes that the term HAHT SAHS is merely descriptive of the name of Appellant's goods, and further, that the term is generic in connection with the identified goods. The Examining Attorney provides that the term is a phonetic equivalent of Hot Sauce, which would be generic for the goods. However, the Examining Attorney does not provide any evidence supporting genericness for the term HAHT SAHS.

While the term is believed to be suggestive, unitary, and unique, and not descriptive, Appellant has agreed, if necessary, to amend the mark to the Supplemental Register in order to effectuate a registration. The discussion that follows is therefore in reference to the standard for genericness.

Marvin Ginn provides the appropriate standard for a determination of genericness. The first task under the standard is to determine the genus of the Appellant's goods. See *Marvin Ginn*, 228 USPQ 528. A proper genericness inquiry focuses on the description of goods or services set forth in the application. *In re Country Music Ass'n Inc.*, 100 USPQ2d 1824, 1827 (TTAB 2011). In this case, the appropriate genus of goods is therefore "sauces" as set forth in the application.

The second task under the standard is then to determine whether the term, in this case HAHT SAHS, is understood by the relevant public primarily to refer to that genus of goods, in this case sauces. See *id.*

In fact, there is no evidence of record that the relevant public understands the newly coined term to refer primarily to the genus, rather than Appellant's goods. See, e.g., *In re Am. Fertility Soc'y*, 51 USPQ2d 1832; *Magic Wand Inc. v. RDB Inc.*, 19 USPQ2d 1551; and *Marvin Ginn*, 228 USPQ 528. Further, while the Examining Attorney did not provide any evidence, a search of the internet for the term registered 74 hits, over 60 of which unequivocally refer to Appellant's product. See Exhibit A, attached to

a previous response. This shows that the relevant public overwhelmingly associates the mark with the Appellant.

ii. The Term HAHT SAHS is not Equivalent to HOT SAUCE

The Examining Attorney, in the Office Action of May 19, 2014, provides that “a novel spelling or an intentional misspelling that is the phonetic equivalent of a generic term is also generic if purchasers would perceive the different spelling as the equivalent of the generic term.” See the Office Action of May 19, 2014, citations omitted. However, Appellant has demonstrated above that purchasers do not perceive the different spellings as equivalent. In fact, as is amply demonstrated by Exhibit A, purchasers seek out Appellant's HAHT SAHS hot sauce.

Further, significant visual and phonetic differences exist between Appellant's mark and the term HOT SAUCE. In addition to the clear visual differences, the pronunciations may be distinct as well. For example, the standard pronunciation for the word sauce is [sɔs] or [sas]. See, e.g., <http://en.wiktionary.org/wiki/sauce#Pronunciation>. The pronunciation associated with Appellant's mark, on the other hand, is SAHS, which can be read as sass. Because there are a variety of potential pronunciations for appellant's mark while the term hot sauce has a known pronunciation, the marks are not phonetic equivalents. Additionally, Appellant's goods are typically purchased online or in stores. In such situations, the substantial visual distinction between Appellant's mark and the goods is critical, and further mitigates any risk that consumers would view the mark as generic.

The Examining Attorney, in the Office Action issued on August 19, 2014, provides that “the marks in question could clearly be pronounced the same” and that “such similarity in sound alone may be sufficient to support a finding” that the words are confusingly similar. See the Office Action citing *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988).

However, *White Swan* sharply distinguishes between the standards for “likelihood of confusion” and those for descriptiveness cases under 2(e) of the Trademark Act, providing that:

*... there is a basic difference between a refusal to register on the ground of likelihood of confusion . . . and a refusal to register on the ground of "merely descriptive" . . . that causes us to reject applicant's request. **In appropriate cases, the fact that a descriptive word has a double meaning may indicate that the word is not "merely descriptive" of the goods or services.** In contrast, in the context of likelihood of confusion, the fact that a word mark will be understood by some individuals in a manner such that confusion with a prior mark is likely and by other individuals in a manner such that confusion is unlikely, will generally still result in a finding of likelihood of confusion, provided that the size of the group of individuals who are likely to be confused is not inconsequential.*

Moreover, in deciding the issue of descriptiveness, it is the policy of this Board to resolve doubts in favor of the applicant and allow the mark to be published.

*In contrast, in deciding the issue of likelihood of confusion, it is the policy of this Board--as mandated by the Court of Appeals for the Federal Circuit--to resolve doubts against the applicant in favor of the registrant. *White Swan Ltd.*, 8*

USPQ2d 1534 (Citations omitted, Emphasis added)

Indeed, if the question to be determined was whether the terms HAHT SAHS and HOT SAUCE are confusingly similar under the standards of Section 2(d) of the Trademark Act, multiple potential pronunciations may not prevent the mark from being confusingly similar, and doubts may be resolved against the Appellant. However, here, where the question is whether the mark is merely descriptive or generic, *White Swan* provides that multiple pronunciations and the resulting double meaning indicate that

the mark is not descriptive (or generic), and clarifies that doubts should be resolved in favor of the Appellant.

iii. Third Party Registrations Further Support Registration of the Mark

Further, a number of situations analogous to the present one demonstrate that the rejection of the mark as generic would be inappropriate in this case. While Appellant recognizes that third party registrations are not determinative of descriptiveness or genericness, the trademark database is nevertheless replete with applications and registrations using phonetic plays on words to create unique, source identifying marks. Several such marks exist on the register for goods similar, or identical, to Appellant's mark:

Mark	Application Number	Disclaimer required	Status	Goods / services
SAUCEE	85/561,290	No	Registered	Organic Sauces; Vegetarian Sauces; Hot Sauce
ZAUCE	85/801,596	No	Allowed	Pizza Sauce
HOSSAUCE	75/852,679	No	Registered	saucers, namely barbecue sauce
SAAS	77/737,948	No	Registered	Hot sauce

Notably, none of these marks required any disclaimer, nor did any of them require amendment to the Supplemental Register. Just as HOSSAUCE and SAAS were found to be registrable, so too should Appellant's mark be registrable.

iv. The Examining Attorney Was Unsure of Genericness in This Matter, and Doubt on the Issue of Genericness is Resolved in Favor of the Appellant

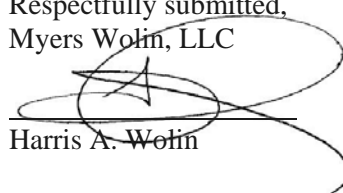
It is further believed that the Examining Attorney has not satisfied her burden of establishing by *clear evidence* that the mark is generic. *In re Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 4 USPQ2d 1141; *In re Am. Fertility Soc'y, supra*; and *Magic Wand Inc., supra*. This must be shown by illustrating that the relevant community views the term as a generic, common descriptive term for the relevant products. In this case, no such evidence was provided, and it is believed that the Examining Attorney was not fully convinced of genericness herself.

In fact, the mark appears to have completed a publication/issue review at the USPTO, and the Office published a Trademark Snap Shot Publication Stylesheet, on April 1, 2014. See Exhibit B attached to a previous response. "Doubt on the issue of genericness is resolved in favor of the applicant." *In re DNI Holdings Ltd.*, 77 USPQ2d at 1437; see also *White Swan Ltd.*, 8 USPQ2d 1534 (providing that "in deciding the issue of descriptiveness, it is the policy of this Board to resolve doubts in favor of the applicant and allow the mark to be published"). In this case, not only does the evidence clearly show that the public recognizes Appellant's mark as a unique source identifier, but the Examining Attorney herself indicated that she initially believed the mark to be registrable.

IV. CONCLUSION

In light of the foregoing, the refusal of registration based on genericness should be reversed and the pending application should be advanced to publication for registration on the Principal Register, or in the alternative straight to registration on the Supplemental Register.

Respectfully submitted,
Myers Wolin, LLC

A handwritten signature in black ink, appearing to read "Harris A. Wolin", is written over a horizontal line. The signature is stylized with a large, sweeping loop that extends to the right.

Harris A. Wolin

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Dated: June 10, 2015